TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 169

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. S. MATTHEWS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

(23,735)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 189.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. B. VOSBURG.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 3, 1914.

* * * * * * *

1–6 In the Supreme Court of the State of Kansas.

No. 18029.

J. B. VOSBURG, Appellee,
v.
THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
Appellant.

Appeal from Edwards County.

Abstract of the Record on Behalf of Appellant.

February 13, 1911.—Plaintiff files his petition alleging an application for three cars in which to ship grain from Lewis to Wichita, and a failure of defendant company to furnish cars within time fixed by Reciprocal Demurrage law of 1907, and seeks to recover statutory penalty in the sum of $275.00, damages in the sum of $40.00, and an attorney's fee of $150.

November 17, 1911.—Trial before court without a jury. Evidence as to a reasonable attorney's fee received against the objection of defendant that the provision of the act relating to reciprocal demurrage providing for an attorney's fee, is in violation of the Constitution of the United States and of the State of Kansas.

December 12, 1911.—Judgment of the court in favor of plaintiff and against defendant for the sum of $220.00, and for the further sum of $50.00 as an attorney's fee. Same day motion for a new trial on the ground of errors of law occurring at the trial, heard and overruled.

The foregoing is a true and correct abstract of the record in said case so far as is necessary to raise the questions relied upon
7 by appellant to reverse the judgment therein.

Specification of Errors.

The trial court erred in holding the provisions of the Demurrage law permitting the recover- of any attorney's fee to be constitutional, and in rendering judgment for such fee in the sum of $50.00. Such judgment for attorney's fee being in violation of the constitutional provisions as denying defendant the equal protection of the law, and as taking its property without due process of law.

WILLIAM R. SMITH,
O. J. WOOD,
ALFRED A. SCOTT,
WILLIAM OSMOND,
Attorneys for Appellant.

8–11 [Endorsed:] 18029. Abstract of Record on Behalf of Appellant. Filed Dec. 9th, 1912. D. A. Valentine, Clerk Sup. Ct.

* * * * * * *

12 In the Supreme Court of the State of Kansas.

Saturday, March 8th, 1913.

No. 18029.

J. B. Vosburg, Appellee,

v.

A., T. & S. F. R'l'y Co., Appellant.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the Judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

13 And on the same day, to-wit, the 8th day of March, 1913, there was filed in the office of the clerk of the supreme court of the state of Kansas, the syllabus and opinion of the Court, which syllabus and opinion are in the words and figures as follows, to-wit:

14 No. 18029.

J. B. Vosburg, Appellee,

v.

Atchison, Topeka and Santa Fe Railway Company, Appellant.

Appeal from Edwards County. Affirmed.

Syllabus by the Court—Birch, J.

The provision of the act relating to the furnishing of cars by railway companies to shippers of freight (Gen. Stat. 1909, sec. 7203) which allows shippers to recover attorney fees in actions successfully prosecuted under the act does not deny the railway companies the equal protection of the laws guaranteed by the federal constitution because they are not allowed attorney-fees if they are successful in such suits, or because they are not allowed attorney fees in actions successfully prosecuted by them against shippers for the detention of cars contrary to the reciprocal provision of the act.

All the justices concurring.

A true copy.
Attest:

_____,
Clerk Supreme Court.

15 No. 18029.

The opinion of the court was delivered by BIRCH, *J.*:

Chapter 345 of the laws of 1905, as amended by chapter 275 of the laws of 1907, concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway company is liable to the shipper for all actual damages suffered, for a penalty of five dollars per day for each car not supplied, and for a reasonable attorney-fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney-fee. The plaintiff recovered a judgment against the defendant for a violation of this statute, including an attorney-fee, and the defendant appeals on the ground that the provision relating to attorney-fees denies it the equal protection of the law guaranteed by the federal constitution.

The question being one which involves an application of a provision of the federal constitution the decisions of the supreme court of the United States are, of course, controlling. Certain fundamental principles are generally recognized. All persons, including corporations, hold property and engage in business subject to the police power of the state. In the exercise of the police power, the state may legislate for the general peace, good order, health, safety, convenience, and welfare. Such regulations must be reasonable and fairly adapted to secure the ends in view. They must operate alike upon all persons similarly situated but classifications may be made in view of peculiar circumstances or conditions which furnish ground for difference in regulation. The Supreme Court of the United States has dealt with these principles in several cases involving the allowance of attorney-fees.

In the case of Gulf, Colorado, and Santa Fe R'y v. Ellis, 165 U. S. 150, it appeared that a statute of Texas gave attorney-fees in cases of claims not exceeding fifty dollars in amount against railway companies, for personal services, labor, damages, overcharges on freight, and stock killed. The statute was held to be void. The court said:

16 "The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protec-

tion. All this is obvious from a mere inspection of the statute. * * *

"While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action. * * *

"* * * The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * *

17 "It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

"If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads of all corporations are selected to bear this penalty. The rule of equality is ignored. * * *

"But if the classification is not based upon the idea of especial privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. Missouri Pacific Railway v. Humes, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a

special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner;
and whether it enforces it by penalties in the way of fines
18 coming to the State, or by double damages to a party injured is immaterial. It is all done in the exercise of police power of the State and with a view to enforce just and reasonable police regulations.

"While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory: it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State.

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

"Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not
visited by reason of the failure to comply with any proper
19 police regulations, or for the protection of the laboring classes or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained.

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * *

"* * * It is apparent that the mere fact of classification is not

sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained." (pp. 153, 154, 155, 156, 157, 165.)

This opinion was written by Mr. Justice Brewer. Chief Justice Fuller and Justices Gray and White dissented.

In the case of Atchison, Topeka &c. Railroad v. Matthews, 174 U. S. 96, the court considered the statute of Kansas which allows an attorney-fee in an action against a railroad company for damages by fire caused by operation of the road. The statute was held to be valid. In the opinion written by Mr. Justice Brewer, it was said:

"The purpose of this statute is not to compel the payment of debts, but to secure the utmost care on the part of railroad companies to prevent the escape of fire from their moving trains. This is obvious from the fact that liability for damages by fire is not cast upon such corporations in all cases, but only in those in which the fire is 'caused by the operating' of the road. It is true that no special act of precaution was required of the railroad companies, failure to do which was to be visited with this penalty, so that it is not precisely like the statutes imposing double damages for stock killed where there has been a failure to fence. Missouri Pac. Railway v. Humes, 115 U. S. 512. And yet its purpose is not different. Its monition to the railroads is not, pay your debts without suit or you will, in addition, have to pay attorney's fees; but rather, see to it that no fire escapes from your locomotives, for if it does you will be liable, not merely for the damage it causes, but also for the reasonable attorney's fees of the owner of the property injured or destroyed. It has been frequently before the Supreme Court of Kansas, has always been so interpreted by that court, and its validity sustained on that ground. In Missouri Pac. Railway v. Merrill, 40 Kansas, 404, 408, it was said:

'The objection that this legislation is special and unequal cannot be sustained. The dangerous element employed and the hazards to persons and property arising from the running of trains and the operation of railroads, justifies such a law; and the fact that all persons and corporations brought under its influence are subjected to the same duties and liabilities, under similar circumstances, disposes of the objections raised.'

"And in the opinion filed in the present case, 58 Kansas, 447, 450, that court observed:

'Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases.' * * *

"That there is peculiar danger of fire from the running of railroad trains is obvious. The locomotives, passing, as they do at great rates of speed, and often when the wind is blowing a gale, will, unless the utmost care is taken, (and sometimes in spite of such care,) scatter fire along the track. The danger to adjacent property is one which is especially felt in a prairie State like Kansas. * * *'

"* * * No other work done, or industry carried on, carries with it so much of danger from escaping fire.

"In 1887 the legislature of the State of Missouri felt constrained to pass an act making every railroad corporation responsible in damages for all property destroyed by fire communicated directly
21 or indirectly from its engines, and giving the corporation an insurable interest in the property along its road. This statute was, after a full examination of all the authorities, held by this court a valid exercise of the legislative power. St. Louis & San Francisco Railway v. Mathews, 165 U. S. 1. So, when the legislature of Kansas made a classification, and included in one class all corporations engaged in this business of peculiar hazard, it did so upon a difference having a reasonable relation to the object sought to be accomplished, to wit, the securing of protection of property from damage or destruction by fire." (pp. 98, 101, 102.)

The Ellis case was distinguished on the ground that the statute of Texas was not a police regulation and that the classification there attempted was purely arbitrary. While the Ellis case involved the killing of a colt the purpose of the statute was not to lessen the hazard to stock. If that had been true, the more stock found on a railroad track, the greater would have been the danger and the more imperative the need of protection. Yet claims under the statute were limited to fifty dollars, making it clear that no police regulation was intended. The statute was simply one to compel the payment of debts. Compelling the payment of debts is not a police regulation and no reason existed for singling out railroad companies from all other debtors and punishing them for such a delinquency. The general principles governing the subject were restated in the following manner:

"On the other hand, it is also true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney-fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary, and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed. Yick Wo v. Hopkins, supra,
22 forcibly illustrates this. In that case a municipal ordinance of San Francisco, designed to prevent the Chinese from carry-

ing on the laundry business was adjudged void. This court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished. * * *

"It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Thus, when the legislature imposes on railroad corporations a double liability for stock killed by passing trains it says, in effect, that if suit be brought against a railroad company for stock killed by one of its trains it must enter into the courts under conditions different from those resting on ordinary suitors. If it is beaten in the suit it must pay not only the damage which it has done, but twice that amount. If it succeeds, it recovers nothing. On the other hand, if it should sue an individual for destruction of its live stock it could under no circumstances recover any more than the value of that stock. So that it may be said that in matter of liability, in case of litigation, it is not placed on an equality with other corporations and individuals; yet this court has unanimously said that this differentiation of liability, this inequality of right in the courts, is of no significance upon the question of constitutionality. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." (Atchison, Topeka &c. Railroad v. Matthews, 174 U. S. 96, 104, 106.)

Justices Harlan, Brown, Peckham and McKenna dissented. In the dissenting opinion delivered by Mr. Justice Harlan, it was said:

"Manifestly, the statute applies only to suits against railroad companies, and only to causes of action arising from fire caused by operating a railroad. It establishes against a defendant railroad company a rule of evidence as to negligence that does not apply in any other suit for damages arising from the negligence of a defendant, whether a corporate or natural person. It does more. It
23 imposes upon the defendant railroad corporation, if unsuccessful in its defense, a burden not imposed upon any other unsuccessful defendant sued upon a like or upon a different cause of action. That burden is the payment of an attorney's fee as a part of the judgment. Even if it appears that the railway company was not guilty of any negligence whatever or that the plaintiffs were guilty of contributory negligence preventing any recovery in their favor, no such fee nor any sum beyond ordinary costs is taxed against them. * * *

"I do not perceive that the judgment now rendered finds support in any adjudication by this court. The above cases proceed upon the general ground that in the exercise of its police power a State may by statute impose additional duties upon railroad corporations, with penalties for the non-performance of such duties, and that such legislation is not, because of its special character, a denial of the equal protection of the laws. It is said to be of the essence of classification that 'upon the class are cast duties and burdens different from those resting upon the general public.' But here the State does

not prescribe any additional duties upon railroad companies in respect of the destruction of property by fire arising from the operating of their roads. It simply imposes a penalty which it does not impose upon other litigants under like circumstances. It only prescribes a punishment for assuming to contest a claim of a particular kind made against it for damages. The railroad company can escape the punishment only by failing to exercise its privilege of resisting in a court of justice a demand which it deems unjust. Undoubtedly, the State may prescribe new duties for a railroad corporation and impose penalties for their non-performance. But, under the guise of exerting its police powers, the State may not prevent access to the courts by all litigants upon equal terms. It may not, to repeat the language of the court in the Ellis case, 'arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency.' Arbitrary selection cannot, we said in the same case, 'be justified by calling it classification.' There is no classification here except one that denies the equal protection of the laws. It would seem that what was said in the
24 Ellis case was exactly in point, namely, 'as no duty is imposed there can be no penalty for non-performance.' Instead of prescribing some penalty for the neglect by the railroad company of duties specifically enjoined upon it, the State attempts—and by the decision just rendered is enabled—to take from the company the right which we declared in the Ellis case was secured by the Constitution, namely, the right to 'appeal to the courts as other litigants, under like conditions and with like protection.'

"Some stress is laid upon the fact that the statute under consideration was passed by a State in which fires caused by the operating of railroads may often cause and are likely to cause widespread injury to grass, crops, houses and barns. What, in the light of the authorities, the State may constitutionally do in order to protect its people against dangers of that character I need not stop to consider. The only question here is whether, in the absence of any statutory regulation prescribing what a railroad corporation shall or shall not do in order to guard property against destruction by fire arising from the operating of its road, the State can deny to such a corporation, when defending a suit brought against it to recover damages on the ground of negligent destruction of property, a privilege which it accords to its adversary in the trial of the issues joined. May the State meet the railroad corporation at the doors of its courts of justice and say to it, 'If you enter here for the purpose of defending the suit brought against you it must be subject to the condition that a special attorney's fee shall be taxed against you if unsuccessful, while none shall be taxed against the plaintiff if he be unsuccessful?' Nothing has ever heretofore fallen from this court sustaining the proposition that the constitutional pledge of the equal protection of the laws admitted of a litigant, because of its corporate character, being denied in a court of justice privileges of a substantial kind accorded to its opponent. If there is one place under our system of government where all should be in position to have equal and exact

justice done to them, it is a court of justice—a principle which I had supposed was as old as Magna Charta.

"In my opinion the statute of Kansas denies to a litigant, upon whom no duty has been imposed by statute and whose liability for wrongs done by it depends upon general principles of law
25 applicable to all alike, that equality of right given by the law of the land to all suitors, and consequently it should be adjudged to deny the equal protection of the laws." (pp. 107, 123.)

The next case deserving special attention is that of Fid. Mut. Life Assn. v. Mettler, 185 U. S. 308. In that case it appeared that a statute of Texas allowed attorney-fees in actions upon policies issued by life and health insurance companies. Fire and marine insurance companies and mutual benefit and benevolent associations were not similarly penalized. The entire argument of the court is represented by the following paragraph from the opinion delivered by Chief Justice Fuller.

"It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions of which life and health insurance companies are permitted to do business in Texas, and the power of the State in the matter of the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in Railroad Company v. Matthews, 174 U. S. 96, applies rather than that in Railway Company v. Ellis. The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit, (and we are not called on to refine as to the distribution of such profits,) and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured." (p. 326.)

26 Justice Brewer concurred in the judgment. Justices Harlan and Brown dissented. In the dissenting opinion by Justice Harlan, it was pointed out that it is one thing to impose conditions upon the doing of corporate business in a state, but an entirely different thing to subject certain corporations to arbitrary statutory penalties after they have been admitted to the state and licensed to do business there. The opinion continues as follows:

"The court says that the ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious. The only reason assigned for that

statement is 'the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.' But the same reasons exist for prompt payment by a fire insurance company when the house which shelters the insured and his family is destroyed by fire. And yet, under the statute, a fire, marine or inland insurance company, if it resists a claim for loss, is not liable, when its defence is unsuccessful, to pay any special damages or special attorney's fee. It can defend any suit brought against it under the same conditions accorded to individual citizens or to corporate bodies generally. But a different and most arbitrary rule is prescribed for life and health insurance companies. Their good faith in refusing to pay a claim for loss, or in defending an action brought to enforce payment of such a claim, is not taken into account. If, in any case, they do not, within a specified time, pay the amount demanded of them, no matter what may be the reason for their refusal to pay, and if they do not succeed in their defence, they must pay not only the principal sum, with ordinary interest, but, in addition, twelve per cent damages on the amount of the principal, and all reasonable attorney's fees for the prosecution and collection of the loss. Thus the State, in effect, forbids a life or health insurance company to appear in a court of justice and defend a suit brought against it, except subject to the harsh condition that if the jury does not sustain the defence, the company must pay special damages and special attorney's fees that are not exacted from any other defendant, corporate or individual, who may be sued for money.

27 "This is such an arbitrary classification of corporations and such a discrimination against life and health insurance companies as brings the statute within the decision in the Ellis case, which has been often referred to by this court with approval. (p. 335.)

The decision in the Mettler case was followed without discussion of principles in the case of Iowa Life Insurance Co. v. Lewis, 187 U. S. 335.

In the case of Farmers' &c. Ins. Co. v. Dobney, 189 U. S. 301, the court considered a statute of Nebraska which reads as follows:

"SEC. 43. Whenever any policy of insurance shall be written to insure any real property in this State against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages.

"SEC. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this State, and also to the renewal, which shall hereafter be made, of all policies heretofore written in this State, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this State

"SEC. 45. The court, upon rendering judgment against an insur-

ance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." (Compiled Statutes of Nebraska, ch. 43.)

The Statute was held to be valid.

On strength of the Mettler case and two others, Orient Insurance Company v. Daggs, 172 U. S. 557, and Hancock Mutual Life Ins. Co. v. Warren, 181, U. S. 73, it was simply announced that insurance policies are susceptible of classification, not only apart from other contracts, but from each other. It was then held that the difference between real and personal property, and the difference between total and partial destruction of property, are enough to warrant classification which will sustain the allowance of attorney-fees, the court saying:

28 "It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured and not permit recovery of such fee when the property insured has been only partially destroyed? The distinction between real and personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the State. If in regulating and classifying insurance contracts the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason." (Farmers' &c. Ins. Co. v. Dobney, 189 U. S. 301, 305.)

This opinion was written by then Justice, now Chief Justice White. Justices Harlan, Brewer, and Brown dissented but no dissenting opinion was filed.

The "obvious distinction" between life insurance policies and fire insurance policies which in the Mettler case furnished a basis for the imposition of attorney-fee penalties in suits on life policies seems to have disappeared. It is very easy to say that the distinction betwen real and personal property gives rise to differences in regulation, but what has become of the doctrine of the Ellis case

29 that mere classification is not enough and that the peculiar regulation which follows the classification must bear some natural and substantial relation to the distinction upon which the

classification is based? It may be observed that "it is obvious" that the partial destruction of real estate covered by insurance concerns the homes of many people the same as total destruction. But, with due deference, it is not obvious upon bare suggestion why differences respecting matters other than value, arising in the adjustment of losses, as for example, fraud on the part of the insured, or non-compliance with some just and reasonable condition of the policy, are so unlike differences respecting value as to spell attorney-fees in one case and not in the other. Indeed, so far as the grounds for this decision are concerned, it would have been precisely the same had the classification been reversed, the property being personal and the loss partial, which is to say that insurance companies may be penalized by the imposition of attorney-fees practically at the will of state legislatures, notwithstanding the fourteenth amendment to the constitution of the United States.

Several state courts have been embarrassed in their efforts to conform to the Ellis case, as the case note 17 L. R. A. (N. S.) 910, shows, and the question arises whether or not that decision is to be refined away in railroad and other cases as it has been in insurance cases. No decision subsequent to the Dobney case throws any clarifying light upon the subject.

Whatever the answer to the question just propounded may be, the court is of the opinion that the statute now under consideration may be sustained under both the majority and minority opinions in the Matthews case, 174 U. S. 96. The act is clearly a police regulation. Perhaps the legislature had in mind certain car shortages which have occurred in the wheat belt of Kansas coincident with manipulations of the Chicago wheat market, discriminations between favored and disfavored shippers, and some other practices quite detrimental to the public welfare. Besides these special matters the prompt furnishing of cars for the transportation of the products and property of the state is so essential to its prosperity that the subject falls well within the police power. In the exercise of this power specific regulations have been adopted and specific duties imposed.
30–54 These duties may properly be enforced by penalties in the form of per diem forfeits and attorney-fees, recoverable in suitable actions. The control of railroad companies over their cars, except in the extraordinary cases exempted from the statute, their capacity mischievously to disturb and obstruct trade, and the helplessness of shippers and others when cars are carelessly or arbitrarily withheld, all combine to place such companies in a class by themselves for the purpose of securing efficient car service, and the equal protection of the law requires no more than that all railway companies shall be penalized alike. It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies cannot explain if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves.

The result is that the statute may be upheld without going to the lengths apparently permitted by the Dobney case and the judgment of the district court is, therefore, affirmed.

All the justices concurring.

A true copy.
Attest:

Clerk Supreme Court.

* * * * * * *

55 In the Supreme Court of the United States.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Plaintiff in Error,
vs.
J. B. VOSBURG, Defendant in Error.

To the Clerk of said Court:

The Atchison, Topeka and Santa Fe Railway Company, the plaintiff in error, intends to rely on the errors set forth in the specification of errors on page 7 of the typewritten record, viz., that the judgment for attorney's fee against the plaintiff in error was in denial of those provisions of the Constitution of the United States and the amendments thereto which guaranteed to plaintiff in error the equal protection of the law, and also that its property should not be taken without due process of law.

Plaintiff in error thinks is unnecessary to print any part of the record herein except the abstract of the record which was before the Supreme Court of the State of Kansas, found on page 6, and also the opinion of the Supreme Court of the State of Kansas contained in the typewritten transcript on pages 13 to 30 both inclusive; said parts of the record being sufficient for the consideration of the questions plaintiff in error desires to present to the court.

WM. R. SMITH,
ROBERT DUNLOP,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error.

56 STATE OF KANSAS,
Edwards County:

I, W. E. Broadie, counsel for J. B. Vosburg, Defendant in Error, do hereby acknowledge service of a copy of the above statement and notice this the 14th day of May, 1913.

W. E. BROADIE.
Attorney for Defendant in Error.

57 [Endorsed:] In the Supreme Court of the United States. The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error, vs. J. B. Vosburg, Defendant in Error. Statement and Notice to the Clerk.

58 [Endorsed:] File No. 23,735. Supreme Court U. S., October term, 1912. Term No. 1160. The Atchison, Topeka & Santa Fe Ry. Co., Pl'ff in Error, vs. J. B. Vosburg. Specification of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed June 6, 1913.

Endorsed on cover: File No. 23,735. Kansas Supreme Court. Term No. 189. The Atchison, Topeka & Santa Fe Railway Company, plaintiff in error, vs. J. B. Vosburg. Filed June 6, 1913. File No. 23,735.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1914.

The Atchison, Topeka and Santa Fe Railway Company, Plaintiff in Error,
v.
J. B. Vosburg, Defendant in Error.
No. 189.

BRIEF OF PLAINTIFF IN ERROR.

WILLIAM R. SMITH,
WILLIAM OSMOND,
Attorneys for Plaintiff in Error.

GARDINER LATHROP,
ROBERT DUNLAP,
Of Counsel.

HALL LITHO. CO. TOPEKA 11914

IN THE SUPREME COURT

OF THE

UNITED STATES.

October Term, 1914.

The Atchison, Topeka and Santa Fe Railway Company,	Plaintiff in Error,	No. 189.
v.		
J. B. Vosburg,	Defendant in Error.	

BRIEF OF PLAINTIFF IN ERROR.

I.

J. B. Vosburg, the plaintiff in the trial court, and appellee in the Supreme Court of Kansas, brought his action in a State court of Kansas against The Atchison, Topeka and Santa Fe Railway Company, under the "Reciprocal Demurrage Law" of the State of Kansas, seeking to recover statutory penalties in the sum of $275.00, actual damages in the sum of $40.00, and an attorney's fee of $150.00.

In the trial court he failed to recover any actual damages, but did recover penalties amounting to $220.00, and an attorney's fee of $50.00.

The Railway Company took an appeal to the Su-

preme Court of the State of Kansas. The sole question involved in the appeal was the constitutionality of the statute allowing the shipper in such a case to recover an attorney's fee. The contention of the Railway Company being that the allowance of such a fee was in violation of the Constitution of the United States, because it denies the defendant Railway Company the equal protection of the law, and took its property without due process of law.

The Supreme Court of Kansas overruled the contention of the Railway Company, and decided that the provisions of the law permitting attorney's fees to be recovered in an action of this kind did not violate the provisions of the Constitution, affirming the judgment of the trial court. This case, entitled *Vosburg v. The Railway Company*, is reported in the 89th Kan., page 114, and is set out in full in the transcript of the record.

II.

The error relied upon for reversal is the action of the Supreme Court of the State of Kansas in holding as constitutional the provisions of the "Reciprocal Demurrage Laws", allowing a recovery of an attorney's fee by the successful plaintiff.

III.

For many years it had been the custom of railway companies to charge shippers what was called a demurrage charge of $1.00 per day for the detention of cars, after they had been in the possession of the shipper for a reasonable time for unloading. Quite a number of years ago in the Western States this practice of the railroad companies brought out a series of acts universally known as "Reciprocal Demurrage Laws." The first act of this character was probably passed by the Legislature of the State of Texas, but its example was soon followed by other States, including the State of Kansas. The first act passed by the State of Kansas was in 1905, and provided in substance that upon a failure of the railway company, after proper application had been made, to furnish cars within a fixed time, the railroad company should be liable to the shipper for a penalty of $1.00 per day for each car not furnished, and it also provided that in case the shipper should make a demand for cars and should not use the same, that he should be liable for a charge of $1.00 per day. In addition to this, either the carrier or the shipper was entitled to recover any actual damages which it might have sustained. In the 1905

law no provision was made for the recovery of attorneys' fees by either party.

In 1907 the law was materially changed. The penalty was changed from $1.00 per day to $5.00 per day, and in addition the shipper was permitted to recover an attorney's fee in case of a successful prosecution of his action, but no such attorney's fee was provided for in a case brought by the carrier, or in case of successful defense against the action of the shipper. This act of the Legislature is Chapter 275, Laws of Kansas 1907. The sections of the act bearing upon the question at issue are as follows:

"SECTION 1. That Section 2 of Chapter 345 of the Session Laws of 1905 be amended so as to read as follows: 'Sec. 2. When the owner, manager or shipper of any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation of any railroad company, receiver, or trustee, operating a line of railway at any point that cars are desired upon which to ship any freight, it shall be the duty of such railway company, trustee or other person in charge thereof to supply the number of cars so required at the point indicated in the application within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the person or persons so applying therefor in the order in which such applications are made, without giving preference to any persons; provided, if the application be for ten cars or less, the same shall be furnished in three days;

and provided further, that if the application be for thirty cars or more, the railway company may have ten full days in which to supply the cars. The time provided in this act for the furnishing of cars as hereinbefore set out shall be deemed a reasonable time, but this shall not be construed as excusing such railroad from the duty of furnishing such cars in a less time than the time mentioned in this act when a less time is reasonable, and the shipper makes application for such cars to be furnished in a less time; provided, that whenever any railroad company is prevented from complying with such demand to furnish cars as aforesaid by any accidental or unavoidable cause, which could not by the use or (of) reasonable foresight and diligence have been avoided, and supplies the same in a reasonable time thereafter, or offers to do so, then the liability for the damages herein provided for and for actual damages and attorney's fees shall not accrue.'

SEC. 2. That Section 4 of Chapter 345 of the Session Laws of 1905 be amended so as to read as follows: 'Sec. 4. When the cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish them shall pay to the party or parties so applying for them the sum of five dollars per day for each car failed to be furnished as exemplary damages, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney fees, to be recovered in any court of competent jurisdiction; but nothing in this act shall in anywise affect the right or remedy of any shipper or other person, as the same may exist at common law or under any statute, to recover on account of failure, delay or refusal to furnish cars, nor to exempt in anywise any such railroad company from any of the provisions of the railroad laws of this state or from any of the obligations imposed

upon railroad companies and common carriers by the common law.'

SEC. 3. That Section 5 of Chapter 345 of the Session Laws of 1905 be amended so as to read as follows: 'Sec. 5. Such applicants shall, at the time of applying for such car or cars, if specifically required so to do, deposit with the agent of the company one-fourth of the freight charges for use of such car or cars; otherwise the company shall not be excused for not furnishing cars on account of failure to make tender on the part of any shipper; provided, that such one-fourth does not exceed the sum of ten dollars per car; and such applicant shall, within forty-eight hours, computing from seven A. M. the day following the placing of the car or cars, after such car or cars have been delivered and placed, as hereinbefore provided, fully load the same, and upon failure to do so, he shall pay to the company the sum of five dollars per day for each car not used, while held subject to the applicant's order; provided, that where applications are made on several days, all of which are filed on the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for on any one day until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars; provided, that if any applicant shall elect to order cars without a deposit, as provided in this section, neither party shall be liable for the penalties prescribed in this and the preceding section.'

SEC. 5. That Section 9 of Chapter 345 of the Ses-

sion Laws of 1905 be amended to read as follows: 'Sec. 9. All loaded cars taking track delivery, which are to be unloaded by the consignee thereof, or the party whose interest may appear, if said cars are of the capacity of sixty thousand pounds or less, shall be limited to forty-eight hours of free time, and if said cars are of the capacity of more than sixty thousand pounds shall be limited to seventy-two hours of free time, computed from seven o'clock A. M. of the day following the day legal notice of arrival is given (having been placed at an accessible point for unloading), and may be subject thereafter to a charge of one dollar per car for each day or fraction of a day that they may remain loaded in possession of the railroad company after said free time; provided, however, that if after placing a car or cars, as required in this section, the railroad company shall, during or after free time, temporarily remove all or any of them, or in any way obstruct the unloading of same, the consignee shall not be chargeable with the delay caused thereby; provided, that when on account of delay or irregularity in transportation, cars are bunched and delivered to consignee in numbers beyond his reasonable ability to unload within the free time prescribed by these rules, he shall be allowed by the carrier such additional time as may be necessary to unload cars so in excess by the exercise of usual diligence on the part of the consignee.' "

In the construction of this act the Supreme Court of Kansas have variously designated it as a "Reciprocal Demurrage Law" or as a "Mutual Demurrage Law". See the language of CHIEF JUSTICE JOHNSON in *Milling Company v. Railway Co.*, 82 Kan. 260, where it is said: "It arises under the

reciprocal demurrage act, which provides, etc." See also the language of JUSTICE SMITH in *Grain Company v. Lumber Co.*, 85 Kan. 282, in which he speaks of the law known as the "Mutual Demurrage Law."

It is to be noticed that the sections above quoted provide reciprocal and mutual rights and remedies as between the shippers and the carrier. These rights may be tabulated as follows:

Rights of Shipper.

Upon failure to receive cars as demanded, the shipper is entitled to recover:

1. His actual damages.
2. The penalty of $5.00 per day for each car not furnished.
3. An attorney's fee in case of suit and recovery.

Rights of Carrier.

Upon failure of shipper to use cars furnished by the carrier, it is entitled to recover from the shipper:

1. Its actual damages.
2. Penalty of $5.00 per day for failure to use cars.
3. No attorney's fee in case it has to bring an action for items numbered 1 and 2 above, or in case it successfully defends an action brought by a shipper under this act.
4. A charge of $1.00 per day in case the shipper detains the cars for longer than a specified period, but no attorney's fee. See Sec. 5 of the Act.

But notice the reciprocity or mutuality of this law. It extends only to items 1 and 2 on each side of the account, while the lack of reciprocity or mutuality is quite evident. The carrier may be put to great expense and trouble to defend against a suit absolutely without merit, but is denied the right to have an attorney's fee taxed against the plaintiff. It also may be put to great expense and trouble in bringing a successful action against the shipper, but is denied the right to recover an attorney's fee, although the shipper suing for the same kind of an injury under the same act would recover such fee.

While the law of 1905 might properly be designated as a mutual or reciprocal law, it is quite evident that the mutuality or reciprocity of the law of 1907 is extremely limited. And yet the kind of injury inflicted by the shipper upon the carrier is entirely similar to the injury inflicted by the carrier upon the shipper in failing to furnish cars when needed. If there ever was a case where the law might properly have been made reciprocal or mutual as to both carrier and shipper, this would seem to be such a case. But, nevertheless, we find that the Legislature has made this discrimination, thus denying to the carrier the equal

protection of the law, and taking its property without due process of law.

The further lack of mutuality is to be seen in the provisions found in Section 5. Under this section the shipper may by the payment of $1.00 per day, retain the control and use of a car indefinitely, thus preventing it from being used by the railway company and furnished to some person actually needing the same. In a time of car shortage because of its inability to get such car back into its possession, the carrier may be compelled, on account of its failure to furnish some other shipper—or possibly the same shipper—with a car, under the provisions of Section 2, to pay to such shipper the sum of $5.00 per day as a penalty, together with an attorney's fee in case of suit, while the shipper is holding the same car at one dollar per day. The injustice of this provision of the law is apparent without argument. The Legislature is supposed by the various provisions of the act in question to have made a law treating alike both shipper and carrier, but the most casual examination shows how far short they have come from accomplishing such a result.

The claim of the plaintiff in error is that this "Reciprocal Demurrage Law" is so lacking in all

reciprocity as to bring it wholly within the condemnation of *Gulf, Colorado & Santa Fe Railway Company v. Ellis,* 165 U. S. 150. This case has been so often considered by this court, that it hardly seems necessary to state very fully the issues involved therein, but it seems that the Legislature of the State of Texas passed an act providing that any person having a valid claim for personal services or labor, or damages, or overcharges on freight, or claim for stock killed or injured, having presented the claim to the agent, and the amount thereof being not in excess of $50.00, might, after thirty days, institute a suit thereon, and upon recovery be entitled to recover in addition to his damage an attorney's fee of not to exceed $10.00. In the course of the opinion, written by JUSTICE BREWER, it is said:

"The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.

We have not been favored with any argument or brief from the defendant in error. Doubtless

he believed, and justly, that nothing could be added to the arguments so fully and strongly made in support of the constitutionality of this law in the respective opinions of the two highest courts of the State.

The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As

well said by MR. JUSTICE BRADLEY in *Boyd v. United States*, 116 U. S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*'

While good faith and a knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subject to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the

attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. . . .

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency. Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigations about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Un-

less the Legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained."

This case recognizes the right of classification, but insists that the classification must be on some reasonable basis, and not upon a mere fanciful theory.

The Supreme Court of Kansas, in its opinion upon the case at bar, suggests that the act is clearly a police regulation and that the Legislature may have had in mind certain car shortages occurring in the wheat belt of Kansas coincident with the manipulation of the Chicago market, and discrimination between favored and disfavored shippers. It suggests that the prompt furnishing of cars for the transportation of the product and property of the State is so essential to the prosperity of the State that the act falls within the police power. But we submit that these suggested reasons are hardly sufficient to authorize the discriminations provided in the act.

In the Ellis case it would have been easy to have shown reasons equally potent. In the matter of supply of cars we can easily imagine a case where the action of the shipper in holding cars loaded

with grain, at some terminal point, and being required to pay only the nominal sum of $1.00 per day, might and would prevent other shippers from obtaining the supply of cars that was absolutely imperative for the proper carrying on of their business. Yet in such a case under the provisions of the act the carrier has no recourse. Under Section 5 it is not even entitled to recover *actual* damages which it may have sustained by the unreasonable detention of cars by the shipper. The sum of $1.00 per day is fixed upon as absolutely determining all that the carrier could recover from the shipper. Such an arbitrary selection cannot be justified by calling it classification. See the language of the court in the Ellis case, at page 159:

"But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of MR. JUSTICE MATTHEWS, speaking for this court in *Yick Wo. v. Hopkins,* 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all

men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit."

We are fully aware that the Ellis case has been distinguished in several later cases. So far, in the history of litigation, it has proved to be but an *ignis fatuus*, holding out to litigants a delusive hope, but eventually leading them into the bogs of defeat.

Attorneys' fees in no respect constitute a part of the damage which may be suffered by one through the wrongful or unlawful act of another, because obviously the alleged wrongdoer may avoid the same by settling the claimant's demand by yielding to his terms and thus avoid a resort to the courts.

Stewart v. Sonneborn, 98 U. S. 187, 197.

Day v. Woodworth, 13 Howard, 363.

Oelrichs v. Spain, 15 Wall. 230, 231.

Hicks v. Foster, 13 Barb. 663.

Good v. Mylin, 8 Pa. St. 51.

If such recovery be authorized at all by statute in favor of either litigant, it is manifest it is only awarded to the successful party as a part of the expenses of litigation and is generally imposed against a defendant as a deterrent to force the settlement of such claims without recourse to the courts. It is a burden placed upon the right of the one party or the other to resort to the courts for an orderly and unbiased determination of the questions in dispute.

Under the Kansas statute the Legislature, by designating the claims of the shipper and the railway company as reciprocal demurrage, has evidently treated these claims as of the same character, and so far as a right of recovery in the courts may be concerned there exists no difference in the character of the demands of the respective parties. The causes of action are of the same character, but a differentiation is simply made in respect to the class of suitors.

A railway company in the courts of Kansas may not defend against a demurrage claim under the statute, although in good faith it has reason to question either the validity of the claim or the amount justly due. The question of the shipper's

damage would be, to say the least, a very uncertain element, and the question whether penalties had justly accrued would depend upon the reasonableness of the shipper's demand for cars and the reasonable ability of the railway company to supply the same within the few days prescribed in the statute. On the other hand, the shipper if sued for unlawfully detaining the cars in loading or in unloading the same, to the great damage of the railway company, will not be mulcted in an attorney's fee if unsuccessful in the defense, although his refusal to pay the demand of the railway company may be not only capricious but vexatious and wholly without justification. Clearly the railway company is not entitled under this statute to resort to the courts either as plaintiff or defendant upon the same terms as a shipper may in a similar character of cases. Such inequality and discrimination as between such suitors renders the statute invalid. The classification is based upon persons and not upon the character of the litigation. It is capricious and arbitrary.

Chicago, St. L. & N. R. R. Co. v. Moss, 60 Miss. 641.

Obviously the attorney's fees are imposed by the statute as a deterrent upon the railway com-

pany to defend against any of these demands made by shippers, and by withholding the right from the railway company to recover similar fees in actions instituted by it there is a deterrent placed upon it to resort to the courts for the collection of its claims, especially where the amounts may be small. It would seem clear that such a statute denies to the railway company the equal protection of the laws of the State. If such a handicap can be placed upon a railway company in its resort to the courts there is, of course, no limit to which the Legislature may not go in placing restrictions upon the right to sue or defend by railway companies merely because they are such.

In the early case of *County of San Mateo v. Southern Pacific R. Co.*, 13 Fed. 722, Mr. Justice Field said, on page 733, referring to the Fourteenth Amendment:

> *"It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances."*

The same idea was reiterated in his opinion in *Barbier v. Connolly*, 113 U. S. 31.

That the imposition of attorneys' fees imposes a penalty for a resort to the courts, and where placed upon one class and not upon another, in respect to similar actions, is unequal and unjust in its operation, denying freedom of access to the courts and the right to be heard therein on equal terms with others, is well set forth in the opinion of the Supreme Court of Michigan in *Wilder v Railroad Co.*, 70 Mich. 382. See also:

Randolph et al. v. Builders & Painters Supply Co., 106 Ala. 501 (17 Sou. 721, 723).

Also *Hocking Valley Coal Company v. Rosser*, 53 Ohio State, 12, wherein it was said:

"Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law."

The case at bar would seem to be stronger than the case of *G. C. & S. F. Ry. Co. v. Ellis, supra*, because here the railway company if forced to sue for a demurrage claim can not, if successful, recover an attorney's fee from a shipper; but a

shipper suing the same railway company upon a claim of a similar character may recover from, and the railway company must pay an attorney's fee if the plaintiff be successful to any extent. We do not understand that the Ellis case has been overruled by this court. The rudiments of fair play to the railway companies are essentially lacking in the statute in question.

C. M. & St. P. Ry. Co. v. Polt, 232 U. S. 165.

St. L. I. M. & S. Ry. Co. v. Wynne, 224 U. S. 354.

Respectfully submitted,

WILLIAM R. SMITH,

WILLIAM OSMOND,

Attorneys for Plaintiff in Error.

GARDINER LATHROP,

ROBERT DUNLAP,

Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, *Plaintiff in Error,*
vs.
J. B. VOSBURG,
Defendant in Error.

No. 189.

BRIEF OF DEFENDANT IN ERROR

I.

This case arose over a failure of the Santa Fe Railway Company, plaintiff in error, to furnish to the defendant in error certain cars in which to make an intra-state shipment of wheat from Lewis, Kansas, to Wichita, Kansas.

II.

The sole question involved in this appeal is the contention of plaintiff in error that the provision of the Kansas statute, which permits the recovery of attorneys' fees against railway companies under certain circumstances wherein such companies fail to furnish cars to shippers, is in violation of the Fourteenth Amendment of the Constitution of the United States.

III.

Plaintiff in error places special stress upon the fact that this law has been referred to as a "Reciprocal Demurrage Law." Whether or not it has been loosely referred to as such, it is not contended that the law is "Recriprocal" or "Mutual" in all respects, nor indeed was it intended to be so. It was meant and intended as a necessary police regulation, classifying railway companies and applicable to all alike, prescribing not only their duties relative to furnishing cars but also regulating them in the transportation and delivery of freight, as a full reading of the context of the act will show. The sections of this act which are omitted from the brief of plaintiff in error read as follows:

"Sec. 4. That for section 6, chapter 345, Laws of 1905, be substituted the following: Sec. 6. When a car or cars are promptly loaded and shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor, and whenever such shipments have been so received by any railroad company, such shipments must be carried forward at the rate of not less than fifty miles per day of twenty-four hours, except Sundays, computing from seven o'clock A. M. the day following receipt of shipment. This shall not be construed to authorize such fifty miles per day as a proper and legal rate of speed for the transportation of live stock and perishable freight, nor release the railroads from any liability for their negligence in failing to handle such shipments at a prompt and reasonable rate of speed. And for failure to receive and transport such shipments within the time prescribed, the railroad company so offending shall pay to the shipper the sum of five dollars per day, Sundays excepted, or fraction thereof, on all car-load freight, and five cents per hundred pounds per day or fraction thereof on freight in less than car loads, with minimum charge of five cents for any one package, upon demand in writing by the shipper, or other party whose interest is affected by such delay; provided, that in computing the time of freight in transit, there shall be allowed twenty-four hours for each transfer from one railroad to another. The period during which the move-

ment of freight is suspended on account of accident or any cause not within the power of the railroad company to prevent shall be added to the free time allowed herein and counted as additional free time.

"Sec. 6. That section 10 of chapter 345, of the Session Laws of 1905, be amended so as to read as follows: Sec. 10. It shall be necessary for the party or parties bringing suit against any railroad company under the provisions of this law to show by evidence that he or they had on hand at the time any demand for cars was made the amount of grain or other freight necessary to load the cars so ordered."

Other sections of the amended act of 1905 which were not repealed by the act of 1907 prohibit the railroads from discriminating among shippers in furnishing cars and penalize railroad companies for failing to notify consignees of the arrival of shipments of freight. With the full text of the law in question and the setting of the same before this Court, together with the learned and able analysis of the principles involved found in the opinion of Justice Burch of the Kansas Supreme Court, which is quoted in full in the transcript of the record, we think it would be a matter of supererogation to go into any lengthy discussion here.

Plaintiff in error relies chiefly upon the case of *Santa Fe Railway Company vs. Ellis*, 165 U. S. 150, but that case is easily distinguished from the one at bar, there being in fact little similarity between them. There the Texas statute attempted to mulct railway companies with attorneys' fees on various classes of claims where the amount involved did not exceed the sum of fifty dollars. No police regulations or duties were imposed to better facilitate the operation of the roads or to make them better protect or serve the people of that State. In the case at bar however the statute in question is explicit in its rules and regulations relative to notice, conditions under which and times when cars shall be furnished, in order to prevent unreasonable and unnecessary delay and discrimination, which, in a great wheat and cattle raising State like Kansas, would vitally affect the prosperity and welfare of its citizens. In the Matthews case, 174 U. S. 96, a statute of this State, which had much less of reason to justify it, and in which duties and regulations were not specifically pointed out, was held valid and the reasoning therein has been repeatedly approved by this Court.

The right of classification is a well recognized principle of our jurisprudence and so long

as it is not arbitrary and unreasonable it is a valid exercise of the police power reserved to the States. And as indicated by Justice Burch in his analysis of insurance cases decided by this Court, the tendency of recent years has been to extend rather than to restrict this police power of classification. The twilight zone between the constitutional and the unconstitutional use of this right of classificattion has been fairly well clarified and this Court has made the line of demarkation reasonably plain.

> *Railroad Company vs. Cram*, 228 U. S. 70.
> *Yazoo & Miss. Val. R. Co. vs. Jackson Vinegar Company*, 226 U. S. 217.
> *C. M. & St. P. Ry. Co. vs. Polt*, 232 U. S. 165.

In the Polt case, *supra*, cited on the last page of the brief of plaintiff in error, the case of *Yazoo & Miss. V. R. Co. vs. Jackson Vinegar Co.* is not only cited approvingly but this Court distinguishes the Polt case and classifies it with the case of *St. Louis I. M. & S. R. Co. vs. Wynne*, 224 U. S. 354, making use of the following language:

> "This case is governed by *St. Louis I. M. & S. R. Co. vs. Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32

> Sup. Ct. Rep. 493. It is not like those in which a moderate penalty is imposed for failure to satisfy a demand found to be just."

In the Wynne case, above cited, the statute of Arkansas as interpreted and applied would mulct railway companies with a double liability and with attorneys' fees for refusing to pay excessive claims within thirty days, and was therefore held unconstitutional. However, statutes which impose a penalty upon railway companies for failure to pay fair and just claims within a limited time have been held valid.

> *Yazoo & Miss. Val. R. Co. vs. Jackson Vinegar Co.*, supra.
> *Atlantic Coast Line R. Co. vs. Coachman*, 59 Fla. 130.

Unquestionably such legislation is valid when the primary object of the law is not to collect debts, but to compel performance of duties which the carrier assumes when it enters upon the discharge of its public functions.

> *Seaboard Air Line R. Co. vs. Seegers*, 207 U. S. 78.

The State of Minnesota has a demurrage statute containing a provision similar to ours relative to assessing attorneys' fees against railroad companies for failure to furnish cars. In passing upon the constitutionality of this provision of the law the Supreme Court of Minnesota, in the case of *Hardwick Farmers Elevator Co. vs. C. R. I. & P. Ry. Co.*, 110 Minn. 25, say:

> "One defendant urges that the provision requiring the payment of attorneys' fees is invalid, because it places upon those who under the terms of the statute owe and do not pay demurrage a penalty not imposed upon debtors generally. Thus the carrier is denied the equal protection of the law and suffers a taking of property without due process of law.
>
> "We are referred to *Gulf, etc. R. Co. vs. Ellis*, 165 U. S. 150. That case involved the constitutionality of a law requiring carriers to pay attorneys' fees on their failure to pay claims for less than fifty dollars for labor, damages, overcharges on freight, or for the killing of stock. It was held that this was a statute which compelled the payment of indebtedness, but which did not come within the scope of the police power. Three justices dissented. In the case at bar, however, the law was enacted in the exercise of police power. The case cited and the class of authorities to which it belongs, have no relevancy to the issues here presented."

From an examination of the foregoing authorities it is evident that the constitutionality of an act classifying and penalizing certain persons or corporations depends upon whether such act is arbitrary, a meddling with purely private affairs and without natural or obvious justification or whether it is fair and reasonable and intended to regulate matters affecting the public interest. The right of a State to classify and to impose special duties and penalties where public interest and welfare justify such action is well recognized as a valid exercise of police power.

M. O. P. Ry. Co. vs. Humes, 115 U. S. 512.
8 Cyclopedia of Law and Procedure, 1101.

Such right of classification is recognized in the Ellis case upon which so much stress is placed by plaintiff in error and in the dissenting opinion in the Matthews case.

In the case at bar there is no contention that the statute in question is unreasonable in its provisions concerning the conditions under which and the times within which railway companies shall furnish cars and section one of the act in question specifically exempts a rail-

way company from all liability for failure to furnish cars where such failure is the result of some accidental or unavoidable cause. Furthermore the penalties provided for are not altogether one-sided, as reasonable demurrage charges are imposed upon the shipper as well as upon the railway company. Also section six of the act effectually prevents a shipper from unjustly penalizing the carrier and interfering with traffic, by providing that he must show in evidence that he had on hand at the time of requesting cars the grain or freight with which to load them before he can recover any damages or penalties. On the whole the statute is certainly a reasonable and just exercise of police power. It does not attempt to take any undue advantage of railway companies. It simply provides certain reasonable and proper regulations for their business as common carriers, classifying them under the police power of the State in order to prevent unjust and unnecessary discrimination against shippers and in order to promote the prosperity and general welfare of the citizens of this State which are vitally dependent upon the kind of service rendered by the railway companies.

In our humble opinion the well considered decision of the Supreme Court of Kansas in this case should be affirmed.

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ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY *v.* VOSBURG.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 189. Submitted March 10, 1915.—Decided June 1, 1915.

Legislation requiring the prompt furnishing of cars by carriers and the prompt loading of same by shippers and prescribing damages and penalties for failure on the part of either, is properly within the police power of the State; in that respect such legislation differs from that which simply imposes penalties on the carrier for failure to pay a specified class of debts. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, distinguished.

A police regulation is, the same as any other statute of the State, subject to the equal protection clause of the Fourteenth Amendment.

That guarantee, while not preventing proper classification, does entitle all persons and corporations within the jurisdiction of the State to the protection of equal laws, including police regulations.

A state statute which imposes reciprocal burdens on both carrier and shipper, but which provides that in the case of delinquency on the part of the carrier the shipper may recover an attorney fee, but in the case of delinquency on the part of the shipper does not provide that the carrier may recover an attorney fee, denies the carrier the equal protection of the law guaranteed by the Fourteenth Amendment.

Such a classification is not a reasonable one and there is no ground on which a special burden should be imposed on one class of litigants and not on another class identically situated.

89 Kansas, 114, reversed.

THE facts, which involve the constitutionality of the reciprocal demurrage law of Kansas of 1905 under the equal protection provision of the Fourteenth Amendment, are stated in the opinion.

Mr. Gardiner Lathrop, Mr. Robert Dunlap, Mr. William R. Smith and *Mr. William Osmond* for plaintiff in error.

Mr. Arthur M. Jackson and *Mr. Wilber E. Broadie* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

The Federal question involved in this case is concisely stated in the opening paragraph of the opinion of the Supreme Court of Kansas (89 Kansas, 114), whose judgment we have under review:

"Chapter 345 of the laws of 1905, as amended by chapter 275 of the laws of 1907 [Gen. Stat. 1909, § 7201 *et seq.*], concerns the furnishing of cars by railway companies to shippers of freight. When cars applied for under this statute are not duly furnished, the railway company is liable to the shipper for all actual damages suffered, for a penalty of five dollars per day for each car not supplied, and for a

reasonable attorney fee. Shippers who fail to use cars placed at their disposal are subject to a penalty for their detention, but are not liable for attorney fees. The plaintiff [Vosburg] recovered a judgment against the defendant for a violation of this statute, including an attorney fee, and the defendant appeals on the ground that the provision relating to attorney fees denies it the equal protection of the law guaranteed by the Federal Constitution."

Upon a review of certain decisions of this court, viz., *Gulf, Colorado & Santa Fé Ry.* v. *Ellis*, 165 U. S. 150; *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96; *Fidelity Mutual Life Assoc.* v. *Mettler*, 185 U. S. 308, and *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301, the state court held (p. 130), that since the Act in question is a police regulation prescribing duties properly enforceable by penalties in the form of per diem forfeits and attorney fees recoverable in suitable actions, and because of the control of railroad companies over their cars, their capacity to disturb and obstruct trade, and the helplessness of shippers when cars are carelessly or arbitrarily withheld, railroad companies might properly be placed in a class by themselves for the purpose of securing sufficient car service, and that the equal protection of the law required no more than that all railway companies should be penalized alike. The court, in conclusion, said: "It is true that shippers may offend somewhat by failing to make expeditious use of cars when furnished them. Whether or not they too shall be penalized, and if so to what extent, is a fit subject for legislative consideration. But the railroad companies cannot [complain] if the legislature chooses to exempt shippers from any punishment, or chooses to prescribe some penalty suitable to the nature of their delinquency, but different from that imposed upon the companies themselves."

The enactment in question is commonly called the "reciprocal" or "mutual" demurrage law. (82 Kansas, 260;

85 Kansas, 282.) It provides that a railway company failing to furnish cars upon proper application shall pay, to the party applying, "five dollars per day for each car failed to be furnished as exemplary damages, . . . and all actual damages that such applicant may sustain for each car failed to be furnished, together with reasonable attorney-fees." At the same time it requires the applicant to load the cars within 48 hours after they are placed, "and upon failure to do so he shall pay to the company the sum of five dollars per day for each car not used, while held subject to the applicant's order. . . . And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the said applicant to use said cars."

We agree that this legislation is properly to be regarded as a police regulation, and in that respect differs from the act that was under consideration in the *Ellis Case*, *supra*, which simply imposed a penalty upon railroad corporations for a failure to pay certain debts. But we cannot at all agree that a police regulation is not, like any other law, subject to the "equal protection" clause of the Fourteenth Amendment. Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation. Thus, in *Atchison, Topeka &c. R. R. Co.* v. *Matthews*, *supra*, the responsibility imposed upon railroad companies for attorneys' fees in addition to damages was sustained

because designed to enforce care on the part of those companies to prevent the communication of fire and the destruction of property along their lines,—a duty imposed upon them and not upon the owners of the property. We need not review the decisions; the subject being so familiar that extended discussion is unnecessary.

The precise question now presented is: What is there in the object of the legislation under consideration that furnishes a ground of distinction between railway company and shipper upon which it is reasonable to say that the latter should be allowed to recover attorney fees when it successfully sues the former, and not *vice versa?* The statute recognizes that the duty of the company to promptly furnish cars, and the duty of the shipper to promptly use them, are reciprocal, and for a breach of either duty the delinquent is penalized in favor of the other party in precisely the same amount—five dollars per day per car. The shipper may also recover his actual damages, if any. The company recovers actual damages, in addition to the penalty, only under special circumstances. No complaint is now made that this is a denial of equal protection, and we lay no stress upon it. But the statute clearly recognizes that either party may be obliged to sue the other in order to recover the penalty, or damages, or both. No reason is suggested, and none occurs to us, why the railroad company, when plaintiff in such an action, will not require the services of an attorney as well as the shipper when he is plaintiff. There is nothing in the nature of the cause of action that renders the burden of preparation more onerous, as a rule, to the shipper when he is plaintiff than to the company when it is plaintiff. There is nothing discernible, therefore, in the purposes of the legislation—which are: to require the prompt furnishing of cars for use, and the prompt use of cars when furnished, and to redress a disregard of either of these requirements by suit when necessary—to give ground for a distinction granting at-

torney's fees to the shipper when he sues, and denying attorney's fees to the company when it sues. In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates rather to the object of securing adequate prosecution in court of actions respecting car service.

In *Missouri, Kansas & Texas Ry.* v. *Cade*, 233 U. S. 642, 650, we had under consideration a Texas statute respecting claims of certain classes against persons or corporations doing business in the State, which provided that if any such claim were not paid within a limited time after presentation, suit might be instituted thereon, and if plaintiff obtained judgment for the full amount of the claim as presented he should recover the amount claimed and costs, and in addition a reasonable amount as attorney's fees. In sustaining the act we said (p. 650): "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimination between different citizens or classes of citizens, since members of any and every class may either sue or be sued. *Actor* and *reus* differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorney's fee as a part of the costs." (Citing *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96; and *Farmers' &c. Ins. Co.* v. *Dobney*, 189 U. S. 301.)

The present case is essentially different, for in the Kansas statute the distinction is not rested upon the fact that the plaintiff, whether shipper or company, has a special burden in the litigation that may reasonably be compen-

sated by allowance of attorney's fees; on the contrary, the Act, while recognizing the existence of such burden, allows compensation for it in favor of one class of litigants, but does not allow like compensation to the other class when subjected to the like burden. This, in our opinion, is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.